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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
-----x

3 DR. PAUL M. CONTI,

4 Plaintiff,

5 v.

17 Civ. 268 (VEC)

6 JOHN DOE,

7 Telephone Conference

8 Defendant.

9 -----x
10 New York, N.Y.
11 March 5, 2018
12 5:22 p.m.

13 Before:

14 HON. VALERIE E. CAPRONI,

15 District Judge

16 APPEARANCES

17 JUDD BURSTEIN, P.C.
18 Attorneys for Plaintiff
19 BY: PETER B. SCHALK

20 EMERY CELLI BRINCKERHOFF & ABADY, LLP
21 Attorneys for Defendant
22 BY: KATHERINE R. ROSENFELD

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1 (In chambers)

2 THE COURT: Hi. This is Judge Caproni.

3 MR. SCHALK: Peter Schalk for the plaintiff.

4 MS. ROSENFIELD: Good afternoon, Judge. Katie
5 Rosenfeld for defendant, John Doe.6 THE COURT: My law clerk just started telling me what
7 the issue is. I gather the plaintiff wants certain discovery
8 to be attorney's eyes only, and the defendant is objecting. Is
9 that right?

10 MR. SCHALK: Yes.

11 MS. ROSENFIELD: Correct, your Honor. This is Katie
12 Rosenfeld for the defendant. We have negotiated a protective
13 order and worked well together, and there's a single remaining
14 issue of dispute, which is what you just described. The
15 plaintiff would like the medical records of Dr. Conti that
16 would be produced by his mental health treatment to be
17 attorney's eyes only, and we have instead suggested attorney's
18 possession only, whereby we would retain all of these documents
19 and not provide any copies to the client, but that we would be
20 able to review them in our office with him and discuss their
21 contents. We think this is appropriate here because the
22 information about Dr. Conti's mental health has really been
23 relevant to this case, whether he was suffering intentional
24 infliction of emotional distress by my client sending him text
25 messages.

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1 We don't think that our client can fairly participate
2 in the case and make tactical decisions and understand what's
3 going on in the litigation without having access, in our
4 presence and in a controlled setting, to these documents. And,
5 you know, I would note that we take seriously our obligations
6 to keep documents that we so designated in this way, and we
7 certainly don't want to be careless in any way with them, but
8 we do think it's very important that Mr. Doe be able to discuss
9 this relevant evidence and make intelligent litigation
10 decisions based on it.

11 MR. SCHALK: Judge, if I could respond, Peter Schalk.
12 I trust my adversary. I don't trust the client, and that's
13 really the issue. I think the APO actually creates more
14 problems than it solved in that at that point he could say
15 whatever he's claiming is in the documents to anybody and is
16 really -- at that point I don't think there's anything we can
17 do with it. I don't know if you've seen some of the
18 communications that are attached to our complaint, but they
19 have been very direct threats made by their client about our
20 client that he should fear them, that he's going to bury them,
21 that he's going to bash him into the curb, etc. Anything can
22 set this individual off. There are cell phones. Even if
23 they're being careful, he could take pictures of records is
24 another issue.

25 We're certainly not planning to abuse this. We just

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want to have the option of designating certain medical records AEO. This is not a case where the defendant has any specific knowledge about mental health issues that he could really help counsel with these records. Counsel is very able counsel. They're certainly going to have an expert who can help them go over these records. They don't really need to share them with the plaintiff at all to help with this case. There's a lot of case law that goes to the fact that you can -- even though we're not denying his mental health is an issue, we're producing the records, we just don't want them shared with this defendant at this point, certainly, at the beginning of discovery. Trial's a different issue, but right now, at the very beginning of discovery, to have our client have to share his mental records with the defendant in particular, not with counsel, is inappropriate at this time.

In addition, the proposed order we have, there are mechanisms if they think something should be de-designated for a specific issue, they can come to us, and if we don't agree, they can go to the Court. It's not a be-all or end-all. We want to have the option.

MS. ROSENFIELD: Your Honor, may I respond?

THE COURT: Yes. The notion that your client, who I think everyone agrees has mental health issues -- it is not at all clear to me why, across the board, he should have access to Dr. Conti's mental health records and why it doesn't adequately

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1 answer your concern that if there are particular records or
2 there are particular issues that you need to be able to discuss
3 with your client, you can either try to work them out with the
4 plaintiff or if you can't work it out with the plaintiff, then
5 on a sort of individual document-by-document basis, you can
6 raise the issue with the Court.

7 MS. ROSENFELD: Well, your Honor, there's a couple of
8 reasons. The first reason is that it's obviously not just the
9 documents themselves that would be attorneys' eyes only, but
10 it's the information contained in the documents. So, for
11 example, if the records show emotional injury to Dr. Conti or
12 not, if they describe encounters with our client that did or
13 didn't happen, if they dictate a certain strategic path, let's
14 say, that Dr. Conti suffered enormous mental injury that's been
15 documented that would somehow dictate a certain strategic
16 decision we need to make, the substance of the information is
17 also confidential, your Honor, not, obviously, just the
18 physical document. So we are very concerned about not being
19 able to have an adequate dialogue with our client about how
20 litigation is proceeding, what decisions we advise, and just
21 general participation in this case which really turns on the
22 substance of whether Dr. Conti suffered a severe emotional
23 injury.

24 I would note, your Honor, that my client also has
25 produced and will be producing all of his own mental health

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1 records to Dr. Conti. I'd also note that my client has not had
2 any contact with Dr. Conti since November of 2017 and that
3 there's no indication that he is not able to follow a court
4 order or properly participate in this litigation subject to the
5 rules that the Court brings up. And I'm reluctant, your Honor,
6 to create a system where these mental health records and the
7 substance contained therein are attorneys' eyes only and then
8 we have to burden the Court with applications. Counsel should
9 be able to use their judgment about what they designate
10 attorneys' possession only, and we will use our judgment about
11 what is appropriate to share with our client substance-wise so
12 that he can participate effectively in this case.

13 I don't think it's reasonable in a case where the
14 first cause of action in the original complaint was intentional
15 infliction of emotional distress. I believe our client does
16 get to know what the emotional distress at issue is being
17 claimed is.

18 THE COURT: I don't think that's an accurate statement
19 of what attorneys' eyes only would do. It is not the case that
20 you would be precluded from having any meaningful conversation
21 with your client. Discovery proceeds with attorneys' eyes only
22 provisions all the time.

23 MS. ROSENFIELD: Your Honor, that's true, and I'm sure
24 your Honor is more than aware it's generally in the context of
25 trade secrets or something of the nature where there's

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1 confidential commercial information. Those are the cases that
2 I have found the Second Circuit case, *In Re City of New York*,
3 607 F.3d 923, that states the disclosure of confidential
4 information on an attorneys' eyes only basis is a routine
5 feature of civil litigation involving trade secrets. I do
6 think the intention of this provision, and Mr. Schalk should
7 correct me if I'm wrong, is not just that I cannot show these
8 medical mental health documents to my client but also that I
9 cannot discuss their substance. So, for example, if there's a
10 document that says Dr. Conti went to a psychiatrist and
11 complained of X, Y, Z event involving my client and then took
12 certain medication to address that, my understanding is that I
13 would not be able to share with my client what that record
14 states is designated AEO.

15 MR. SCHALK: Well, if I can respond, in the first
16 instance, it's clearly not -- there's a lot of cases where
17 mental health records that are AEO. This one in particular,
18 *Bagley v. Yale University*, the District of Connecticut.
19 There's a Westlaw Cite, 2016 WL 1531341.

20 THE COURT: Read that number again.

21 MR. SCHALK: So it's 2016 WL 1531341, case Nos.
22 3:13-CV-1890. And there's a holding there that "because the
23 only stated and discernible need for this discovery is to allow
24 the defense counsel to prepare a defense in the emotional
25 distress claim, the production made by this ruling will be for

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1 attorneys' eyes only." I can give your Honor other cites. It
2 just seems to me, their issue going against the emotional
3 distress claims, it's clear that medical records produced, even
4 by a plaintiff in that context, it's appropriate to have them
5 be attorneys' eyes only. And if there's some legitimate need
6 for some item, they can come to me. I'll work with them. I
7 have no problem with that.

8 But to say, out of the box, we're precluded, with this
9 defendant in particular, I just don't think -- we're not
10 fighting that there's an issue; we're not fighting that they're
11 entitled to that information. There are some real risks with
12 this individual. And the fact that he has been a little more
13 behaved recently, I just have no idea what could set him off.
14 And if he starts, we can't really put the cow back in the barn,
15 or at that point if he starts saying or if he claims
16 something's in the records and he doesn't even have copies of
17 them, we can't even disprove that. So it's --

18 MS. ROSENFIELD: Your Honor, the case that Mr. Schalk
19 cites involves an ongoing employment relationship where the
20 plaintiff was currently employed by the university as a
21 professor, I believe, and then there was an issue about whether
22 the current employer should have access to the employee's
23 mental health records. I think it's a different situation than
24 here. The fact is Dr. Conti has placed all this information at
25 issue by filing this lawsuit against my client, including my

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1 client's full mental health history in the public docket, and
2 we can't adequately represent him and have discussions about
3 strategic advice if those key documents are confidential in the
4 way that I understand them to be under the provision that
5 plaintiff wants.

6 MR. SCHALK: Judge, if I just could respond on the
7 issue as to the employer-employee relation?

8 THE COURT: No, I don't need you to respond on that.
9 I do need you to respond in terms of what you think how broad
10 this is. Do you think an attorneys' eyes only prohibition
11 would prohibit the attorneys for the defendant telling the
12 defendant that based on their review of your client's medical
13 records, he has been damaged by the defendant's conduct?

14 MR. SCHALK: No, I don't think it's that broad, and if
15 your Honor wants, we can put something in to make that clear.
16 I don't have a problem with counsel even summarizing
17 information in that way at all. But if he comes into their
18 office and sits down and starts going through mental health
19 records, I don't know what he's going to tell people about what
20 he sees there.

21 MS. ROSENFIELD: I don't think there's --

22 MR. SCHALK: Sorry.

23 MS. ROSENFIELD: I don't think there's a distinction
24 between what our client can tell people based on what I tell
25 him and what he can tell people based on looking at a piece of

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1 paper. The fact is your client, unfortunately, decided to sort
2 of open the Pandora's box of claiming that he was injured, and
3 we should be able to freely discuss the facts of the case which
4 are contained in those records with our client --

5 THE COURT: OK.

6 MS. ROSENFIELD: -- in a controlled setting that
7 doesn't involve emailing him copies. I completely agree with
8 that.

9 MR. SCHALK: That's not what the -- said --

10 THE COURT: Folks.

11 MS. ROSENFIELD: Well, the only case you sent me was
12 that one, so --

13 THE COURT: All right. Stop.

14 MR. SCHALK: Sorry.

15 THE COURT: Stop. If you all want to argue with each
16 other, you don't need me on the phone.

17 I am inclined to agree with the plaintiff. I think I
18 am going to encourage the plaintiff to be forthcoming when the
19 defendants ask for the ability to share certain kind of
20 particularized information, but I think, given the facts, given
21 sort of the undisputed facts, whether plaintiff was actually
22 injured or not, I don't think there's any real dispute about
23 the texts and emails that the defendant sent out. Now, it
24 could be, Ms. Rosenfeld, that you now have him completely under
25 control and he's not doing things like that. I would just note

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1 that if that's true, it makes his conduct all the more
2 inexplicable at the period of time that he was sending the
3 emails that are at issue in this case. But be that as it may,
4 it seems to me that, like many attorneys, you can manage to
5 review the discovery materials, make reasoned decisions about
6 what your client needs access to and what they don't need
7 access to. If the plaintiff won't agree that the information
8 can be shared with the client, you can always come to me for an
9 exception to the attorneys' eyes only rule on a case by case,
10 particularized information by particularized information. But
11 I just see no reason why the defendant himself needs access to
12 all of the plaintiff's psychological records or psychiatric
13 records.

14 MS. ROSENFIELD: Your Honor, I assume that this
15 designation, the idea that Mr. Schalk mentioned that we could
16 summarize information that we believe is tactically important
17 and provide it to our client, that we can try and work out some
18 language to that effect?

19 THE COURT: Absolutely.

20 MS. ROSENFIELD: Obviously, your Honor, this is a
21 bilateral confidentiality agreement, and so if we believe that
22 there are similar things that are highly sensitive that should
23 also be AEO, that we would also be able to use the designation
24 appropriately also.

25 THE COURT: Of course.

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1 MR. SCHALK: Of course. It's a --

2 MS. ROSENFIELD: Thank you, your Honor, for your time.

3 THE COURT: Thank you. Sorry I had to delay a couple
4 times.

5 MR. SCHALK: Hope everything's going well with your
6 trial, Judge.

7 THE COURT: Thanks.

8 (Adjourned)

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